STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED December 15, 2011
v	No. 300604 Kent Circuit Court
EARL LEE CUMMINGS, Defendant-Appellant.	LC No. 09-010900-FH

Before: MARKEY, P.J., and FITZGERALD and BORRELLO, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial conviction for third-degree criminal sexual conduct, MCL 750.520d. The trial court sentenced defendant to 30 months to 15 years' imprisonment. For the reasons set forth in this opinion, we affirm the conviction and sentence of defendant.

Defendant's conviction arose out of a sexual assault that he committed on the 14-year-old daughter of his former girlfriend. Defendant entered the victim's room one afternoon after school and had sexual intercourse with her against her will. He lived with the victim and her mother at the time of the assault.

After dismissing three different appointed attorneys, defendant represented himself at trial. He insisted that his appointed attorneys did not have his best interest in mind, and thus, he wished to proceed in propria persona. Defendant missed several court-imposed deadlines during trial, and blamed his failure to comply with the trial court's procedural requirements on his lack of access to the prison's law library.

On appeal, defendant asserts two issues: (1) that he was denied his constitutional right of access to the courts because he was denied access to the law library, and (2) that the trial court erred in granting defendant's request to act as his own counsel.

As to defendant's first issue, the record indicates that defendant wrote a letter to the trial court on January 3, 2009,[1] alleging that he was being denied access to the library in the Kent

[1] Although the letter is dated January 3, 2009, it was actually written on January 3, 2010.

County jail. Judge Mark Trusock, acting as a substitute trial judge in this case, wrote a letter on March 16, 2010 directing the Kent County Sheriff to permit defendant to use the law library. This generated another letter by defendant the very next day indicating that he was still being denied access.[2] Then, on the last day of trial, defendant stated that although he had some access to the law library at the Kent County Correctional Facility, he was not given the amount of access that he believed he was due. He alleged that when he tried to use the library, there often was no one present to allow him to do so. Defendant also expressed his dissatisfaction that the person in charge of the library was unable to help him prepare his defense. Despite the trial court not making a ruling on the issue, and contrary to the assertions by the prosecutor that this issue is unpreserved, we find that defendant has preserved this issue for appeal. *People v Grant*, 445 Mich 535, 551; 520 NW2d 123 (1994).

In *People v Mack*, 190 Mich App 7, 19-20; 475 NW2d 830 (1991), this Court stated:

> It is clearly established beyond a reasonable doubt that prisoners and incarcerated defendants have a constitutional right of access to the courts. Further, the United States Supreme Court has established that, in the absence of other forms of adequate legal assistance, this right of access to the courts requires providing prisoners with adequate assistance from persons trained in the law *or* adequate law libraries to assist prisoners in the filing of legal papers. See *Bounds v Smith*, 430 U.S. 817; 97 S Ct 1491; 52 L Ed 2d 72 (1977). ''Prisoners are to be supplied some means of obtaining legal assistance, be it in the form of adequate prison libraries, 'jailhouse lawyers,' or outside legal assistance.'" *Walker v Mintzes*, 771 F2d 920, 931 (CA 6, 1985). However, the constitutionally guaranteed right is the "right of access to the courts, not necessarily to a prison law library." *Id.*, at 932. Restricted access to a law library is not, per se, a denial of access to the courts. *Id.*; *United States v Evans*, 542 F2d 805 (CA 10, 1976). The law library is but one factor in the totality of all factors bearing on the inmate's access to the courts which should be considered. *Mintzes*, *supra*.

In *People v Yeoman*, 218 Mich App 406, 415; 554 NW2d 577 (1966), lv den 456 Mich 857 (1997), this Court, relying on *Mack*, stated: "The state satisfied its constitutional obligation when it offered defendant the assistance of counsel, which he declined. The state was not required to offer defendant law library access once it fulfilled its obligation to provide him with competent legal assistance." (Internal citation omitted).

In this case, we cannot find that the defendant was denied his constitutional right of meaningful access to the courts. Defendant was offered three court appointed attorneys, and the

[2] While both of defendant's letters to the trial court allege that defendant was being denied access to the jail law library, the letters are mainly generated in an effort by defendant to advise the trial court of his angst for his court-appointed attorney, as well as his efforts to report the trial judges to various groups and agencies for what he believed was their attempt to "railroad" defendant. Very little, if any, information is contained within the letters that specifically indicates how defendant was being denied access to the jail law library.

trial court wrote a letter to the Kent County Sheriff ensuring defendant access to the jail law library. Furthermore, as stated by this Court in *Mack* and *Yeoman*, denial of access to a prison's law library does not mandate a finding that the state violated a defendant's access to the courts. Rather, it is but one factor for a reviewing court to consider when determining whether the defendant was denied meaningful access to the courts. Defendant chose not to avail himself of the three court appointed attorneys provided to him by the State. Pursuant to our holding in *Yeoman*, *Id.* at 415, this factor alone is sufficient for a finding by this Court that defendant was not denied his constitutional right of meaningful access to the courts. However, the record clearly reveals that the State made every effort to facilitate defendant's requests and afford him meaningful access to the courts. It was defendant that chose not to have one of the three court appointed attorneys represent him. Further, defendant's chief complaint following the trial court's instructions to the Kent County Sheriff to allow defendant access to the jail law library was that the person in charge of the library was not present to assist defendant. Had defendant used one of the three attorneys appointed to represent him, this issue would be moot. Thus, reviewing the record in its entirety, defendant has failed to bring to this Court a prima facie case that he was denied his constitutional right to meaningful access to the courts.

Next, defendant argues that the trial court erred when it allowed him to represent himself at trial. "We review for an abuse of discretion the trial court's decision to permit [a] defendant to represent himself." *People v Hicks*, 259 Mich App 518, 521-522; 675 NW2d 599 (2003). A trial court must find three things before it grants a defendant's request for self-representation. *Id.* at 523. First, the defendant must unequivocally make his request. *Id.* Second, the request must be "knowing, intelligent, and voluntary, with the defendant having been made aware by the trial court of the 'dangers and disadvantages of self-representation' . . . ." *Id.*, quoting *People v Anderson*, 398 Mich 361, 368; 247 NW2d 857 (1976). Third, the trial court must find that the defendant will not unduly disrupt the proceedings while acting as his own counsel. *Id.*

Defendant contends that the trial court erred in allowing him to represent himself because he did not understand the risks and disadvantages associated with self-representation. However, the record does not support his argument. In fact, the record reveals that the trial court made every effort to advise defendant of the risks inherent in self-representation. The trial court informed defendant that his opponent was an experienced prosecutor who would not give him any breaks because of his lack of legal knowledge. Further, the trial court informed defendant that he would be required to comply with evidentiary and procedural rules. As this Court noted in *People v Morton*, 175 Mich App 1, 8-9; 437 NW2d 284 (1989), lv den 434 Mich 881 (1990), cert den 498 US 836; 111 S Ct 105; 112 L Ed 2d 76 (1990):

> [t]o permit a defendant in a criminal case to indulge in the charade of insisting on a right to act as one's own attorney and then on appeal to use the very permission to defend one's self in pro per as a basis for reversal of a conviction and a grant of another trial is to make a mockery of the criminal justice system and the constitutional rights sought to be protected. We would not permit it.

Accordingly, the trial court informed defendant of the risks of self-representation, and it did not abuse its discretion when it allowed defendant to represent himself. *Hicks*, 259 Mich App at 521-523; *People v Williams*, 470 Mich 634, 644-645; 683 NW2d 597 (2004).

Defendant also argues that the trial court erred when it found that he was competent to represent himself at trial. Defendant does not challenge his competency to stand trial, but rather his competency to represent himself. We note that "A different standard applies with respect to competency to represent one's self as opposed to competency to stand trial." *People v McMillan*, 63 Mich App 309, 313; 234 NW2d 499 (1975). "A defendant may not waive his right to counsel if his mental incompetency renders him unable to understand the proceeding and make a knowing, intelligent and voluntary decision." *People v Brooks*, __ Mich App__; __ NW2d__ (Docket No. 298299, issued August 16, 2011); *Godinez v Moran*, 509 US 389, 401 n 12; 113 S Ct 2680; 125 L Ed 2d 321 (1993). A defendant makes a knowing, intelligent, and voluntary decision to waive counsel if he is informed of the risks and disadvantages of self-representation. *Hicks*, 259 Mich App at 523. Defendant argues that his erratic behavior throughout the proceedings demonstrated that he was not competent to represent himself. The test for whether a defendant is competent to represent himself at trial focuses on whether the defendant's waiver of counsel is knowing, intelligent, and voluntary. *Hicks*, 259 Mich App at 521. Indeed, "[t]he purpose of the 'knowing and voluntary' inquiry . . . is to determine whether the defendant actually *does* understand the significance and consequences of a particular decision . . . ." *Moran*, 509 US 389, 401, n 12 (emphasis in original). As discussed above, the trial court did not abuse its discretion when it determined that defendant understood the significance and consequences of representing himself. Therefore, defendant made his decision to proceed in propria persona knowingly, intelligently, and voluntarily. *Moran*, 509 US at 401 n 12; *Hicks*, 259 Mich App at 521-523.

Affirmed.

/s/ Jane E. Markey
/s/ E. Thomas Fitzgerald
/s/ Stephen L. Borrello